IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 220

ATLANTIC COAST LINE RAILROAD COMPANY, JACKSONVILLE TERMINAL COMPANY, and SEABOARD AIR LINE RAILROAD COMPANY,

Petitioners,

—v.—

BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOWELL KENNEDY, T. C. BOLAND, and J. E. EASON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The essential arguments of respondents' brief have been anticipated in our opening brief.[1] However, a marked change of approach in this Court on the part of the respondents certainly requires comment. To the extent that this change of approach involves an attempt to restate the record, we shall call attention to it as such; but this changed approach is indicative in and of itself of the respondents' recognition that adoption of their absolute theory—that the

[1] With the possible exception of the respondents' argument concerning preemption by the Labor Management Relations Act ("LMRA"), to which we make reply in part 2 of this brief.

Norris-LaGuardia Act ousted the District Court of jurisdiction—leaves the sort of statutory gap which is not to be attributed to Congress in enacting the various components of the federal labor legislation. It now appears that respondents are attempting to cast aside this absolute theory that the District Court was powerless to prevent picketing aimed at shutting down all rail movements in or through the Jacksonville Terminal.

1. The respondents' brief labors the point—which we do not deny—that when the "major dispute" provisions of the Railway Labor Act are exhausted the parties to the controversy are free to use self-help against each other. (Res. Br. 48-51) But respondents are unable to find any authority for the proposition that at this point a party to the controversy may use self-help weapons against persons who are not parties to the controversy in order to put economic pressure on them in turn to put economic pressure on the other party to the controversy to resolve it. Nor do respondents cite any authority to the effect that the Norris-LaGuardia Act prevents an innocent bystander to a railway labor controversy, who has not had the benefit of any of the procedures of the Railway Labor Act, from obtaining an injunction against the escalation of the economic warfare against him.—Indeed, the two leading cases of this Court which respondents rely on, dealing with the relationship between the Norris-LaGuardia Act and the situation when the "major dispute" provisions of the Railway Labor Act are exhausted, are both "accommodation" cases. They are cases which harmonize the Norris-LaGuardia Act and the Railway Labor Act by holding that parties to a dispute who have not complied with the Railway Labor Act or who have not exercised the means which that Act provides them for the settlement of disputes may not obtain injunctions.

See *Order of Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, 339 (1960); *Brotherhood of Railroad Trainmen* v. *Toledo, P.&W.R.Co.*, 321 U.S. 50, 58-61 (1944).[2] Surely they do not bar a party who has not had available to him the Railway Labor Act's procedures from obtaining an injunction.

This failure to find anything in the Railway Labor Act that resembles a provision sanctioning the sudden embroilment of carriers not parties to a railway labor controversy in an escalation of that controversy by a rail union has apparently led respondents—without their acknowledging it—to ignore the plain implications of their basic legal theory. That theory has always been that the Norris-LaGuardia Act completely deprived the District Court of jurisdiction here to enjoin the escalation of the economic warfare against the petitioners; under that theory, no matter how "secondary" the picketing might be thought to be, it was completely immune from injunction by reason of the Norris-LaGuardia Act. But in this Court, for the first time, respondents seek to describe the picketing as something other than it was in fact and in its effect—a complete stoppage of access to the terminal property at every rail entrance, and a stoppage of all through moves through the

[2] We discuss the *Telegraphers* case at p. 29 n. 13 of our opening brief. The *Toledo* case simply holds that voluntary arbitration under the Railway Labor Act is one of the matters which a party must resort to, to demonstrate that he has made "every reasonable effort," as required by § 8 of the Norris-LaGuardia Act, to settle a dispute, before he may obtain an injunction in cases (unlike this one) to which the Norris-LaGuardia Act applies. As Mr. Justice Rutledge's opinion in the *Toledo* case, quoting Representative LaGuardia, makes plain: "If the railroads have complied [with the Railway Labor Act], they would not, as has been suggested, be deprived of any relief which they may have in law or equity." 321 U.S., at 59. By a parity of reasoning, where the benefits of no procedures are available to petitioners under the Railway Labor Act they should not be held to be deprived by the Norris-LaGuardia Act of injunctive relief againsts the attempt by respondents to drag them into a dispute to which they were not a party.

terminal on petitioners' own lines, as well as of all interchanges by petitioners among themselves or with carriers other than the FEC.

Thus, under the respondents' new position, it suddenly becomes of crucial importance whether the pickets, whose presence obviously would have prevented any Coast Line main line trains from entering the terminal property at the Dennis Street crossing,[3] were standing on the tracks or immediately alongside. (Res. Br. 21)[4] In order to make this assertion, of course, it is necessary for the respondents, through a question-begging device,[5] to make sub-

[3] Even if the pickets photographed at R. 182 did not continue walking in the direction in which they are walking in the picture, that is, onto the tracks, it is plain that their presence close to the tracks would cut off the access of main line Coast Line trains into the Jacksonville terminal from the south across the Dennis Street crossing, since the train crews would not cross the line. (R. 62-63, 134) This case does not turn on physical obstruction of tracks by pickets. (See Res. Br. 19)

It is idle to argue, as do the respondents, that the District Court did not accept the contentions of the petitioners as to the effect of the picketing. (Res. Br. 21) The District Court's Finding No. 8 is obviously dependent upon that court's conclusion that the picketing cut off not simply the interchanges but the main line operations of the petitioners. (R. 29)

[4] Indeed, by p. 53 of the respondents' brief, the following assertion is essayed: "The evidence concerning the Coast Line's Dennis Street crossing here becomes highly significant . . . and the fact that the respondents did *not* picket the crossing there as petitioners claim . . . demonstrates the obvious fact that the picketing here arises directly out of the FEC-BRT labor dispute." (Emphasis original)

[5] Respondents contend that, despite the fact that the District Court received it, it was erroneous to receive affidavit evidence in addition to the oral testimony and that, in effect, the affidavits in the record which are contrary to the position of the respondents may not be considered. The only authority cited for this is § 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. But § 7 does not say that affidavit evidence may not be used to some extent even in a case governed by the Norris-LaGuardia Act. And the short answer is that respondents' argument simply begs the question; for unless the Norris-LaGuardia Act applies to this case, which is one of the basic questions at issue, its § 7 is inapplicable.

tractions in their favor from the whole record and to ignore the fact that, despite their objection to the evidence that the pickets were at the crossing, the District Court admitted it. (R. 98)

Similarly, with respect to the Acorn Street crossing—where a main line of the Seaboard from Savannah, Georgia, crosses across the terminal property in order for trains to reach the West Jacksonville yard of the Seaboard or to continue along the Seaboard's main line track—it is necessary for respondents to indulge in another flight of fancy with the record. (Res. Br. 22) At first there is an effort to deny the plain testimony of Seaboard's witness as to the location of the picketing. (Res. Br. 22; see R. 136) Then respondents state that: "In any event, the Seaboard crossing of Acorn, like the Seaboard crossing at Stockton, is the closest public place to Seaboard's northern access route to YH and Honeymoon Yards where Seaboard and FEC perform their interchange business with each other." (Res. Br. 22) But the fact of the matter is that, as the map at page 9 of our opening brief makes plain, Seaboard train movements crossing Acorn Street are simply main line movements, not interchange movements; there is no access through the terminal property from the Acorn Street crossing to the YH yard and the Honeymoon yard.

By page 64 of the Respondents' Brief, these liberties with the record that have been taken are escalated into a dogmatic misassertion of fact: "[R]espondents did not picket rail entrances to the Terminal Company premises used by rail movements unrelated to FEC." It would be hard to find a grosser or more flagrant misstatement of the record. The fact of the matter is that *every* public crossing entrance to the terminal which the respondents picketed is used by rail

movements unrelated to the FEC. As we pointed out in our opening brief (pp. 4-7), the terminal property stands athwart the main line of the Coast Line into peninsular Florida and a main line of the Seaboard running through Jacksonville. The terminal is also the location for interchanges among the carriers at Jacksonville, the majority of which interchanges do not involve the FEC. (Pet. Br. 5-7, and nn. 9 & 10) All these main line moves and the interchanges between carriers not involving the FEC must enter and leave the terminal property at the appropriate public crossing entrance and exit, either McQuade Street, Stockton Street, Acorn Street, Church Street or Dennis Street. All of these crossings were picketed by respondents.[6] Moreover, the Dennis Street and Acorn Street crossings are used *exclusively* for movements which are not destined for interchange with the FEC. The only rail entry to the terminal which is used exclusively for FEC-related movements is the underpass under Riverside Avenue at the end of the Acosta Bridge over the St. Johns River; and this was the one rail entrance into the terminal which the respondents did not picket. (R. 70-75, 121, 183)

Further symptomatic of the respondents' recognition of the essential weakness of their position is their remarkable statement at page 64 of their brief:

> "But for the injunction issued within hours after the picketing began, further arrangements could have been made to limit the effects of the picketing. For instance, certain tracks could have been designated by the Terminal Company solely for FEC movements

[6] Indeed, it is only as to the Dennis Street crossing, and to a half-hearted extent, the Acorn Street crossing, that respondents now raise some question. (Res. Br. 20-23)

> and other tracks designated solely for the use of the other carriers. Interchange freight not destined for FEC could have been segregated and brought on to the Terminal Company premises in separate rail movements. The Terminal Company could have permitted the pickets to come onto its premises to picket the actual places within the Terminal Company premises where FEC interchange and other FEC work is performed."

The first thing to note about this statement is that it recognizes that the picketing had the immediate effect and the initial intent of blocking all the main line moves through the terminal and all the interchange movements unrelated to the FEC. The second point to note about it is that the assertions it blandly makes about working out "arrangements" are absurd as a matter of practical fact. If there had been no injunction there would have been no incentive at all for the respondents to restrict their picketing in any fashion whatsoever; if, as was the apparent original position of respondents in this matter, the Norris-LaGuardia Act totally ousts the District Court of jurisdiction, there would be no practical reason why the respondents should not have continued their picketing at all public crossing entrances to the terminal in order to make the petitioners suffer until they were willing to embargo the FEC.

But more important, of course, is the fact—which the quoted passage and the others we have referred to seem to reflect—that it appears that the real contention of respondents here is not, as they have always contended, that the District Court had no jurisdiction, but rather that their grievance appears to be essentially with the breadth of its

order.—If, as seems to be the case, the real grievance of respondents is the breadth of the District Court's order, we must point out that this complaint is being made for the first time in this Court. What is before this Court for adjudication is, essentially, the question of the District Court's jurisdiction. It is only a preliminary injunction that is before this Court, and the scope of appellate review, jurisdictional questions apart, of such an injunction is limited, as we have indicated in our opening brief. (Pet. Br. 50) If the respondents have a quarrel with the breadth of the order—whether, for example, it should have added to it certain conditions to assure that the FEC employees in fact use the reserved gate, a detail to which respondents now draw considerable attention (Resp. Br. 35-36)—it is not to be assumed that the District Court will neglect to consider those matters in its final hearing on a permanent injunction should the respondents bring them forward in the District Court. But those details have never been urged before, and hardly should be considered in the first instance by this Court on its review of the District Court's jurisdiction and of the question whether it abused its discretion in issuing a preliminary injunction.

We hasten to add, of course, that we do not take the position that it would be appropriate to permit picketing at any of the public crossings or other locations, apart from the reserved gate, where the respondents threw up their picket line. At all of those locations, even where some of the crossing movements involve interchange with the FEC, there are substantial amounts of movements which have nothing at all to do with the FEC—either through movements on a single carrier's line, or interchanges between carriers other than the FEC. Furthermore, we disagree with the

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[1] And, of course, approximately 70% of the freight interchanges at the terminal do not involve the FEC at all. (R. 11)

premise that respondents may picket even those movements of the petitioners which are destined for interchange with FEC or which consist of cars which have come from FEC. The authorities cited by respondents under the provisions of Section 8(b)(4) of the LMRA—the force of which as a statutory analogy both sides of this case now seem to recognize—do not go this far.* In delivering cars for interchange to the FEC or picking them up from the FEC, petitioners are doing their own work as interstate carriers and are not doing the FEC's work; indeed they are not voluntary "allies" but simply carriers doing their duty under the Interstate Commerce Act. Despite the emotional appellation of the respondents (Res. Br. 67), none of the work done by Terminal Company employees or by the Seaboard's or the Coast Line's employees in the terminal area is "struck work" or work which was previously done by the FEC, as we developed at pages 37-39 of our opening brief.—The point is, rather, that the approach of respondents in their own brief is the plainest sort of indication that there is something fundamentally wrong with their essential legal theory, which is that the Norris-LaGuardia Act gives them

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* The principal authority cited is *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1964), which held that picketing at an adjacent spur where cars were delivered to a struck industrial concern was not proscribed by § 8(b)(4). But here, the terminal is not immediately adjacent to the FEC's own premises; and to refer to the "delivery" of the rail cars for interchange with the FEC as equivalent to the "delivery" of goods to a struck industry (Res. Br. 66) is to indulge in a play on words. In the case of picketing an industrial delivery site, the only stoppage is of movements to and from the struck employer, who is the consignee or shipper. But even if there were some way in which only the interchange operations of petitioners with the FEC could be picketed, the picketing then would be an effort to stop the through movement for the account of petitioners' innocent customers—the shippers and consignees on petitioners' lines who ship or receive freight on through routes in part over the FEC's lines—who, like petitioners, are not parties to the respondents' troubles with the FEC.

carte blanche to escalate their dispute against the FEC by shutting down the Jacksonville Terminal.[9]

2. The respondents give emphasis in their brief to a contention that the District Court lacked jurisdiction because the conduct enjoined is arguably subject to the exclusive primary jurisdiction of the NLRB under the LMRA. While we discuss this contention to the extent its merits intrinsically require in a footnote to our opening brief (p. 53, n. 2), perhaps some further discussion is warranted in view of the emphasis given it by respondents.

The definitional section of the LMRA is plain on its face in exempting controversies entirely within the railroad industry, as this one is, from the coverage of the LMRA and the jurisdiction of the NLRB. Section 2 of the LMRA provides in pertinent part:

> "(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any person subject to the Railway Labor Act, as amended from time to time. . . .

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[9] While respondents spend 20 pages (Res. Br. 27-47) in an effort to establish that in and of itself the Norris-LaGuardia Act, read apart from the Railway Labor Act, is applicable to secondary conduct of the sort involved here, the only conclusion one can be left with from a reading of this lengthy exercise is that indeed, as we pointed out in our opening brief (p. 42), and as the Court of Appeals observed (R. 45-46), there is no authoritative holding of this Court to the effect that, even apart from the Railway Labor Act, the Norris-LaGuardia Act forbids the grant of an injunction against the sort of conduct involved here.

Respondents cite the Clayton Act at considerable length in their discussion of the law. (Res. Br. 1-3, 34-38, 62-63) But §§ 6 and 20 of that Act, relied on by respondents, are *in pari materia* with the Norris-LaGuardia Act, see *United States* v. *Hutcheson*, 312 U.S. 219, 235-36 (1941), and must like it be accommodated to the later provisions of the Railway Labor Act.

"(3) The term 'employee' shall include any employee . . . but shall not include . . . any individual employed by an employer subject to the Railway Labor Act, as amended from time to time. . . ." 29 U.S.C. §§ 152(2), (3).

"Labor organizations" are subject to the Act only if "employees" within the foregoing definitions participate in them:

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5).

There is no dispute that all the *dramatis personae* in the events which led up to this lawsuit—the FEC, its employees, the Coast Line, the Seaboard, the Terminal Company, their employees, and the respondents—are persons subject to the Railway Labor Act. It would make a mockery of the elaborate scheme for dealing with labor controversies in the railroad industry to suggest that Congress also superimposed on it the jurisdiction of the NLRB. The authors of the LMRA made it plain that they had no such purpose:

"The exemption of employees of employers subject to the Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents [in the LMRA] it was not intended to include such employees." S. Rep. No. 105, 80th Cong., 1st Sess. (1947), p. 19.

As this Court has pointedly said:

> "The Act, in its definition of an 'employer', expressly excludes anyone subject to the Railway Labor Act. 61 Stat. 137, 29 U.S.C. § 152(2). It is of course true that employer-employee relationships of railroads such as respondent are governed by the Railway Labor Act, which was passed before either the National Labor Relations Act or the Labor Management Relations Act. Neither of the latter Acts was intended to tread upon the ground covered by the Railway Labor Act. It is clear that neither railroads nor their employees may carry their grievances with one another to the N.L.R.B. for resolution. . . ."
>
> "We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act." *Local Union No. 25* v. *New York, N.H.&H.R.Co.*, 350 U.S. 155, 159-60 (1956).[10]

The only authority cited by respondents to the effect that they are "arguably" subject to the LMRA is *International Brotherhood of Electrical Workers* v. *NLRB*, 350 F.2d 791 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966). But the only basis on which certain railroad brotherhoods were there held liable to an order of the NLRB was that they had acted as agents for certain unions subject to the LMRA. As the Court of Appeals there framed the ques-

[10] The 1959 amendments to § 8(b)(4) of the Act extended that section to make it apply where railroads were the victims of secondary conduct, but only by a nonrail union or its agents. See § 704, Pub. L. 86-257, 73 Stat. 542; *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1964).

tion: "The only significant question presented is whether . . . two of the petitioners [the rail brotherhoods] can be held liable as 'agents' of 'labor organizations' for actions which would violate the express provisions of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act if committed by 'a labor organization or its agents'." 350 F.2d, at 792. We have yet to hear the name of any nonrail union for whom respondents are "arguably" acting as agents in this case. In point of fact, there is none, and the entire reliance upon the *Electrical Workers* case is ill-founded.

It is worthwhile to remember just what this controversy is, and indeed who the respondent brotherhoods are. This is an all-rail controversy; common carriers by rail and three of the major operating railroad brotherhoods—organizations unquestionably subject to the Railway Labor Act—and the carriers' employees and the brotherhoods' rail-worker members are the actors. We do not have presented any severable, nonrailroading aspect of the carriers' business about which the controversy centers. *Cf. Pan American World Airways, Inc.* v. *United Brotherhood of Carpenters and Joiners*, 324 F.2d 217 (9th Cir. 1963).[11] If the sort of controversy involved in this case is "arguably" subject to the NLRB, every labor contro-

[11] The work involved in the *Pan American* case, cited by respondents (Res. Br. 60), involved a government contract for housekeeping and general support services, awarded to Pan American by the Atomic Energy Commission, to be performed at the AEC's Nevada test site at Jackass Flats, Nevada, a point not located on Pan American's air routes. "Pan American's work was the preventive maintenance of electrical, electronic and ventilation equipment and such technical functions as the storage and use of liquids, fuels and gases. The work is in connection with the development of a nuclear rocket engine to be used for the propulsion of space vehicles." 342 F.2d, at 220. —Obviously, this work had nothing at all to do with Pan American's airline transportation business. By contrast, the activities involved in this case are obviously railroading activities.

versy in the railroad industry would be, at least until the NLRB specifically disclaimed jurisdiction in each case; and as a practical matter the independent regime which Congress meant to preserve for railway labor matters would be at an end. Respondents have not suggested any stopping place if this matter is "arguably" subject to the NLRB.

The claim of exclusive primary jurisdiction in the NLRB concerning this matter is thus frivolous. No one has ever contended that this matter is actually within NLRB jurisdiction. The respondents once again disclaim that it is (Res. Br. 61, n. 33) and make it patent that their purpose in raising the issue is, as we have previously indicated (Pet. Br. 53-54, n. 2), simply part of their overall plan to take the position that there is no jurisdiction anywhere—whether in a federal or a state court, or in an administrative agency—to enjoin their attempt to escalate their dispute with the FEC into a rail tie-up of the Terminal Company, of the systems of the Coast Line and the Seaboard, and of rail access into the whole of peninsular Florida.

CONCLUSION

For the reasons stated in our opening brief and herein, the judgment of the Court of Appeals should be reversed, and the order of the District Court granting the limited preliminary injunction should be affirmed.

Respectfully submitted,

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